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Supreme Court of the United States

OCTOBER TERM, 1950

No. 515

JOHN D. REILLY,
Petitioner,

v.

HON. HENRY W. GODDARD, United States District Judge,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit or a Writ of Mandamus to the United States District Court for the Southern District of New York or Other Appropriate Writ

BRIEF IN OPPOSITION

EDWARD C. WALLACE,
Attorney for Nola Electric, Inc.,
60 East 42nd Street,
New York 17, N. Y.

EDWARD L. MERRIGAN,
of Counsel.

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BRIEF IN OPPOSITION

The action to which the petition relates is pending in the United States District Court for the Southern District of New York, under the name *Nola Electric, Inc.*, Plaintiff, v. *John D. Reilly,* Defendant, Civil Action No. 44-396. This brief is submitted on behalf of Nola Electric, Inc., plaintiff in said action, in opposition to the petition for a writ of certiorari or mandamus.

Opinions Below

The opinion of the District Court, rendered by respondent on November 29, 1950, is printed in the record at pages 35-38. The opinion is not reported.

The opinion of the Court of Appeals denying the petition for mandamus may be found in the record at pages 40, 41.

The opinion of the Court of Appeals denying petition for reargument is printed in the record at page 44. Neither opinion of the Court of Appeals has yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under Section 1254 and Section 1651 of the Judicial Code (28 U. S. C. § 1254, 1651).

Questions Presented

1. Judge Goddard, pursuant to Rule 34 of the Federal Rules of Civil Procedure, ordered petitioner to obtain and produce copies of three designated documents under petitioner's control for inspection and copying by plaintiff (R. 38-40). The Court of Appeals denied petitioner's petition for mandamus, holding that Judge Goddard's order will be reviewable upon appeal, and that said order cannot be reviewed prior to "final decision" by mandamus (R. 40, 41). The principal question presented, therefore, is whether Judge Goddard's interlocutory order, not otherwise appealable before "final decision", can nevertheless be reviewed at this time through the device of a petition for certiorari, mandamus or other extraordinary writ.

2. Assuming the Court holds Judge Goddard's order to be appealable prior to "final decision", then a second question is presented. The documents Judge Goddard ordered to be produced were written by petitioner to the Bureau of Internal Revenue during the Bureau's attempt to recover from petitioner, for application to plaintiff's tax indebtedness, the 1,700 shares of stock involved in the action pending in the District Court (R. 9-11). The documents concededly have a direct bearing upon the most important issues involved in the pending action (R. 35).

Petitioner, by deposition, testified that he is unable to recall the contents of his communications to the Bureau, and he retained no copies thereof (R. 11-17). The Commissioner of Internal Revenue has twice stated for the record, once after he examined all of the motion papers upon which Judge Goddard predicated his opinion and order, that it is the policy of the Bureau to furnish copies of such documents to the person who wrote them to the Bureau upon his application or request therefor (R. 22, 23, 34). Under such circumstances, did Judge Goddard properly direct petitioner, under Rule 34 of the Federal Rules of Civil Procedure, to apply to the Commissioner of Internal Revenue for copies of such documents, and, upon obtaining such copies, to produce same for plaintiff's inspection and copying?

Statement

(1) The Pending Action

The pending action is for breach of contract. Plaintiff, Nola Electric, Inc., seeks to recover $300,400 from petitioner, John D. Reilly, for his refusal to transfer and deliver upon plaintiff's demand 1,700 shares of the capital stock of Todd Shipyards Corporation, of which corporation petitioner is president (R. 5).

Briefly, the amended complaint recites that, on May 5, 1934, petitioner purchased 1,700 shares of Todd Shipyards Corporation stock for plaintiff's account (R. 5-6). On the same date plaintiff delivered to petitioner a check in the sum of $46,671.21 in payment of said stock (R. 6). For business purposes and because of the long-standing, close friendship between petitioner and Monte E. Hart, then president and virtual owner of plaintiff corporation, plaintiff and petitioner ageed orally that the said 1,700 shares of stock would be held by petitioner in his name until plaintiff should request the transfer and delivery of said shares and all accumulated dividends. The shares

of stock and dividends were held by petitioner pursuant to this agreement until January 16, 1942, when plaintiff demanded delivery thereof. The amended complaint then charges that petitioner refused to deliver said stock and dividends and, as a result, plaintiff suffered damages amounting to $300,400 (R. 6).

Petitioner's answer denied all the material allegations of the amended complaint (R. 6).

In the course of petitioner's examination before trial he admitted receiving on or about May 5, 1934, from Mr. Hart, then president of plaintiff corporation, a check in the amount of $46,671.21 (R. 7). He denied that the check was sent to him in payment of stock purchased for plaintiff's account and denied that he had in fact purchased stock for plaintiff. On the contrary, he asserted that the check represented repayment of cash loans made by petitioner to plaintiff's president from time to time (R. 7).

(2) The Motion Before Judge Goddard

In view of the position taken by petitioner, both in his answer and at his examination before trial, plaintiff moved under Rule 34 of the Federal Rules of Civil Procedure for discovery of certain documents written by petitioner to the Bureau of Internal Revenue, which documents have a direct bearing upon the transaction of May 5, 1934 between plaintiff and petitioner (R. 3-23).

The documents sought by the motion were written by petitioner under the following circumstances: In 1940, the Bureau of Internal Revenue made a jeopardy assessment against plaintiff, Nola Electric, Inc., for back taxes and penalties amounting to $179,183.29 (R. 8). The Bureau learned, in the course of its investigation of plaintiff, that petitioner, Reilly, was holding 1,700 shares of Todd Shipyards Corporation stock for plaintiff's account (R. 8). Accordingly, upon plaintiff's inability to pay the assessment, the Bureau filed a lien against the

stock in petitioner's possession (R. 9). The Bureau communicated with the petitioner and requested an explanation of the transaction of May 5, 1934 between petitioner and plaintiff's president, Mr. Hart (R. 9, 10). Petitioner, by letter dated July 26, 1940 (one of the documents sought by plaintiff's motion before Judge Goddard), replied, in part, as follows (R. 10):

> "My recollection of a payment of $46,671.21 to the order of Jesup & Lamont about May 5, 1934 was to reimburse for stock purchased from time to time for and at the direction of Mr. M. E. Hart, covering principally stock of Todd Shipyards Corporation."

The Bureau asked petitioner for a further explanation (R. 10). On August 7, 1940, petitioner replied. This letter (also sought by plaintiff's motion before Judge Goddard) reads, in part, as follows (R. 10, 11):

> "In response to your letter of July 31, 1940, I wish to state that to the best of my recollection the amount of $46,671.21 payable to Jesup & Lamont on May 5, 1934, was in payment of the purchases of stock made for M. E. Hart from time to time, but did not apply entirely or specifically to the 1,700 shares referred to in your letter."[1]

One month after petitioner wrote the above letter Mr. Hart, president of plaintiff corporation, died (R. 25). The Assistant Attorney General of the United States, to whom the Bureau later referred its claim against petitioner for suit, pointed out in a letter, dated June 19, 1941, addressed to the then United States Attorney for the Southern District of New York, that it was only after Mr. Hart's death that petitioner made the claim which he asserts in the pending action, to wit, that the $46,671.21 was delivered to him in payment of cash loans and not to purchase stock for plaintiff's account (R. 11).

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[1] The third document sought by plaintiff is a memorandum submitted by petitioner to the Bureau, containing a list of the stock certificate numbers covering the 1,700 shares of stock.

At his examination before trial petitioner testified that he had retained no copies of his communications to the Bureau and he was unable to recall the contents thereof (R. 11-16). Plaintiff thereupon requested that petitioner obtain copies of the documents from the Bureau (R. 16). Petitioner refused to do so (R. 16, 17).

In view of petitioner's refusal, plaintiff itself (prior to the motion before Judge Goddard) applied to the Commissioner of Internal Revenue for copies of said documents (R. 17). Plaintiff was advised that the documents presently exist in the Bureau's files, but that, in accordance with the Bureau's policy with regard to furnishing copies of letters and papers located in its files, such copies will be furnished only upon the request or application of the person who wrote or filed such papers or letters (R. 18). The Bureau's policy was confirmed in a letter, dated August 28, 1950, addressed to plaintiff's counsel by the Acting Commissioner of Internal Revenue (R. 22, 23). Said letter refers to the precise circumstances of the case at bar, and states (R. 22, 23):

> "You are advised that generally, this office will upon request of the writer, furnish to him copies of his communications submitted to the Bureau * * *."

Plaintiff's motion under Rule 34 of the Federal Rules, therefore, was for an order directing petitioner to obtain and produce copies of his communications to the Bureau for inspection by plaintiff (R. 3-5). After plaintiff made its motion before Judge Goddard, and while the motion was pending, petitioner's counsel submitted all of the motion papers to the Commissioner of Internal Revenue and asked anew whether the policy of the Bureau was correctly set forth in plaintiff's motion papers (R. 32). The Commissioner replied by letter, dated October 26, 1950, confirming that the policy of the Bureau was correctly set forth in the Acting Commissioner's letter referred to above (R. 34).

At no time before Judge Goddard did petitioner deny that he wrote the documents in question, nor did he contest the relevancy of the documents to the principal issues involved in the pending action. In spite of the Commissioner's statement that the documents would be made available for production upon request of the writer (petitioner), petitioner resisted the motion on the ground that the documents were confidential and beyond his control (R. 35).

(3) Judge Goddard's Decision and Order

In his decision, Judge Goddard held that the documents were not privileged, and that, in view of the position taken by the Commissioner in this case, production of the documents would not be inimicable to the public welfare (R. 38). Judge Goddard held further that the documents were within petitioner's control (R. 38). Consequently, in the order filed pursuant to his opinion, Judge Goddard directed petitioner to apply to the Commissioner for copies of the documents, and, upon obtaining same, to produce them for plaintiff's inspection and copying (R. 38-40).

(4) The Denial of Mandamus by the Court of Appeals

Petitioner's motion in the Court of Appeals was for leave to file a petition for a writ of mandamus directing Judge Goddard to vacate and set aside his order for discovery (R. 1-3). The motion was resisted on two grounds. First, on the ground that Judge Goddard's order was interlocutory, and therefore non-appealable before "final decision". Secondly, that Judge Goddard's order was correct and proper in every respect. The Court, consisting of Judges Learned Hand, Swan and Augustus M. Hand, unanimously denied petitioner's motion and refused to issue a writ of mandamus (R. 40, 41).

ARGUMENT

The argument shall consist of two points. First, we submit that this Court has already determined, in a long, unbroken line of decisions, that interlocutory orders such as Judge Goddard's cannot be reviewed piecemeal through the device of a petition for certiorari, mandamus or other extraordinary writ. The second point deals with the merits of Judge Goddard's opinion and order. Assuming the Court holds the order for discovery to be appealable at this stage of the litigation, then we submit that the order, made pursuant to Rule 34 of the Federal Rules of Civil Procedure, is correct and proper in every respect.

I

Judge Goddard's interlocutory order, not otherwise appealable before "final decision", is not reviewable at this time through the device of a petition for certiorari, mandamus or other extraordinary writ.

Judge Goddard's order is clearly interlocutory. It does not finally decide the matter in controversy between plaintiff and petitioner. It is simply a step in the pre-trial discovery procedure established by the Federal Rules of Civil Procedure, and, as such, it merely directs petitioner, a party litigant, to obtain and produce documents under his control for inspection and copying.

Congress has provided that such orders are appealable only after "final decision" (28 U. S. C., § 1291). The policy of the Federal Courts has always been opposed to piecemeal reviews, and this Court has held consistently that writs of certiorari, mandamus and prohibition may not be used as substitutes for an appeal authorized by Congress. *Ex parte Whitney,* 38 U. S. 404 (1839); *Ex parte Morgan,* 114 U. S. 174 (1885); *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.,* 148 U. S. 372 (1893);

In re Atlantic City R. Co., 164 U. S. 633 (1897); *Ex parte Union Steamboat Co.*, 178 U. S. 317 (1900); *In re Key*, 189 U. S. 84 (1903); *In re Pollitz*, 206 U. S. 323 (1907); *Ex parte Nebraska*, 209 U. S. 436 (1908); *In re Riggs*, 214 U. S. 9 (1909); *Ex parte Harding*, 219 U. S. 363 (1911); *Ex parte Roe*, 234 U. S. 70 (1914); *Roche* v. *Evaporated Milk Association*, 319 U. S. 21 (1943); *U. S. Alkali Export Association* v. *United States*, 325 U. S. 196 (1945); *McMurtrey* v. *Clark*, 157 F. 2d 703, cert. denied 329 U. S. 805 (1947); *Roberts* v. *United States District Court*, 339 U. S. 844 (1950).

The Court of Appeals held that Judge Goddard's order will be reviewable upon appeal from any judgment for plaintiff. Thus petitioner is possessed of an adequate remedy. If he loses upon the merits, and the "final decision" is in favor of plaintiff, then, through an appeal to the Court of Appeals, he will be entitled to a review of Judge Goddard's order for discovery. Under such circumstances, it is well settled that when petitioner has an adequate remedy for review this Court will refuse to issue an extraordinary writ. *Ex parte Newman*, 81 U. S. 152, 165 (1871); *Bayard* v. *United States*, 127 U. S. 246, 250 (1888); *In re Pennsylvania Co.*, 137 U. S. 451, 453 (1890); *Morrison* v. *District Court*, 147 U. S. 14, 26 (1893); *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 45 (1913); *In re Tiffany*, 252 U. S. 32 (1920); *Ex parte Davis*, 262 U. S. 274 (1923), *Ex parte Fahey*, 332 U. S. 258 (1947).

In *Ex parte Fahey*, supra, Mr. Justice Jackson, writing for the Court, stated the rule succinctly at page 260:

> "These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals."

Directly in point to require dismissal of the petition are the decisions of this Court in *Alexander* v. *United States*, 201 U. S. 117 (1906), and *Cobbledick* v. *United States*, 309 U. S. 323 (1940). In the *Alexander* case, officers of defendant corporations were directed to appear and pro-

duce documents before a Special Examiner. Upon their refusal to submit the documents called for on the ground of privilege, the United States moved for an order requiring compliance. An order directing production of the documents was issued and appeals were allowed to this Court. These appeals were dismissed for want of jurisdiction upon the ground that the order directing production of the documents was interlocutory and non-appealable before "final decision".

In the *Cobbledick* case a District Court refused to quash a subpoena duces tecum and directed petitioners to produce documents before a grand jury. Petitioners appealed to the Circuit Court, which dismissed the appeal. This Court affirmed, holding that the District Court's order directing production of the documents was interlocutory and non-appealable.

The holding in the *Cobbledick* case was followed by the Court of appeals in the case at bar, and in *Bank Line* v. *United States,* 163 F. 2d 133 (2nd Cir., 1947), and *United States* v. *Bondy,* 171 F. 2d 642 (2nd Cir., 1948), as basis for its refusal to review by mandamus District Court interlocutory orders directing production of records and documents claimed to be confidential or privileged.

Moreover, it is well established in the decisions of this Court that the various writs are extraordinary remedies, to be applied only in rare or extreme cases. *Ex parte Fahey, supra; Ex parte Collett,* 337 U. S. 55, 72 (1949); *Roberts* v. *United States District Court,* supra. Writs will not issue in cases wherein a District Judge has simply exercised his discretion to pass upon a matter properly before him. *Ex parte Park & Tilford,* 245 U. S. 82 (1917); *Ex parte Roe,* supra; *Bartlesville Zinc Co.* v. *Interstate Commerce Commission,* 30 F. 2d 479 (D. C. Cir., 1929), cert. denied 279 U. S. 856 (1929). Rather, the writs have been used almost exclusively in situations wherein a District Court refused to exercise jurisdiction or improperly took jurisdiction. *In re Hohorst,* 150 U. S. 653 (1893); *Hudson* v. *Parker,* 156 U. S. 277, 288 (1895); *In re Parker,*

131 U. S. 221 (1889); *In re Grossmayer,* 177 U. S. 48 (1900); *Ex parte First National Bank,* 228 U. S. 516 (1913).

Thus, in *United States Alkali Export Association* v. *United States,* supra, cited by petitioner in his brief, certiorari was granted because the District Court would have been without any jurisdiction at all if, as alleged, exclusive jurisdiction was given by Congress to the Federal Trade Commission. In *Ex parte Simons,* 247 U. S. 231 (1918), cited by petitioner, the writ was granted because the District Court "repudiated jurisdiction", depriving petitioner of a jury trial. In *Ex parte Kewato,* 317 U. S. 69 (1942), also cited by petitioner, the District Court abated an action and refused to allow an enemy alien to proceed further therewith. This Court issued a writ because the District Court Judge improperly refused to take jurisdiction. In *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701 (1927), and *Ex parte Bransford,* 310 U. S. 354 (1940), also cited in petitioner's brief, the motions for leave to file petitions for mandamus were denied.

We submit, therefore, that Judge Goddard's order lies wholly without that class of extreme cases wherein this Court has issued writs of certiorari or mandamus. In the instant case Judge Goddard did not refuse to take jurisdiction, nor did he attempt to usurp jurisdiction belonging to some other Court or Board as claimed in the *U. S. Alkali* case. Judge Goddard merely exercised his discretion, in an action properly before him, to decide that the documents in question should be produced for inspection. Judge Goddard did not disregard or refuse to follow the Federal Rules of Civil Procedure, nor did he fail to pass upon a privilege asserted by petitioner. On the contrary, his holding was based upon and intended to give effect to the discovery procedure prescribed by the Rules, and he carefully passed upon each of the assorted privileges urged by petitioner.

Petitioner alleges, however, that Judge Goddard erred by directing production of documents "as to which a valid

governmental privilege exists". But the Government itself claims no privilege here. In fact, the Commissioner of Internal Revenue, after examining all of the motion papers upon which Judge Goddard founded his decision, declared for the record that it is the policy of the Bureau to make the documents available (R. 22, 23, 34).

Moreover, we have failed to note any conflict in Circuit Court decisions as urged by petitioner. In fact, all reported Circuit Court decisions are in accord, and they establish sound authority for Judge Goddard's decision in the case at bar. *United States* v. *Monjar,* 147 F. 2d 916, 924 (3rd Cir., 1945), cert. denied 325 U. S. 859 ( ); *In re Hines,* 69 F. 2d 52 (2nd Cir., 1934); *June* v. *George C. Peterson Co.,* 155 F. 2d 963 (7th Cir., 1946).

In conclusion, it was the observation of the Court of Appeals that if Judge Goddard's order were held to be appealable by mandamus, so would be every other District Court order requiring production of documents alleged to be privileged. Such a holding, we submit, would weaken considerably the Federal policy against piecemeal appeals, as it would encourage litigants and witnesses, at any stage of a litigation, to delay proceedings by insisting upon an immediate review to determine the validity of an alleged privilege.

It is respectfully submitted, therefore, that Judge Goddard's order is not appealable at this time and that the petition for certiorari and mandamus must be denied.

II

Assuming the Court examines into the merits of Judge Goddard's order, said order, and the decision upon which it is based, are correct and proper in every respect.

Assuming the Court should decide, contrary to Point I, that the merits of Judge Goddard's order should be gone into at this time, we submit that said order, and the decision upon which it is predicated, are correct and proper in every respect.

Plaintiff's motion before Judge Goddard was made pursuant to Rule 34 of the Federal Rules of Civil Procedure, which reads, in part, as follows:

> "*Discovery and Production of Documents and Things for Inspection, Copying or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties * * * the Court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, * * * letters, * * * or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control, * * *. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

This Court, which promulgated the Federal Rules, has decided that Rule 34 must be liberally construed to allow parties an inspection of whatever documents and records appear to contain evidence material to any matter involved in a federal civil action. *Hickman* v. *Taylor,* 329 U. S. 495, 507 (1945). In the *Hickman* case, it was stated, at page 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment * * *. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession * * *."

This interpretation of Rule 34 has been followed consistently by the Court of Appeals for the Second Circuit and by the District Court for the Southern District of New York. *Bank Line* v. *United States,* supra; *Rosseau* v. *Langley,* 7 F. R. D. 170 (D. C. S. D. N. Y., 1945); *United*

States v. *United States Alkali Export Assn.*, 7 F. R. D. 256 (D. C. S. D. N. Y., 1946); *Judson* v. *Buckley*, 3 Fed. Rules Serv. 34.42 (case 6) (D. C. S. D. N. Y., 1940); *Seligson* v. *Camp Westover, Inc.*, 1 F. R. D. 733 (D. C. S. D. N. Y., 1941).

In the case at bar, the documents sought by plaintiff's motion are concededly relevant and material to the main issues involved in the pending action (R. 35). The documents were shown to exist, and although petitioner claims an inability to recall their contents or to produce copies from his files, he has failed to deny that the documents were written by him to the Bureau (R. 35). Judge Goddard found that the documents were voluntarily submitted to the Bureau by petitioner in connection with the Bureau's attempt to recover from petitioner, for application to plaintiff's tax indebtedness, the 1,700 shares of stock, whose ownership is in issue in the pending action (R. 35, 36). As stated previously, the Bureau has officially decided to make the documents available if petitioner, in accordance with Bureau policy, makes a request or application therefor (R. 22, 23, 24, 34). Petitioner, however, opposes production of the documents on two grounds. First, he claims the documents are beyond his possession, custody or control, and, secondly, he urges that the documents are privileged.

Federal Courts have held consistently that they have authority under Rule 34 (and its counterpart, Admiralty Rule 32) to grant motions such as plaintiff's motion before Judge Goddard, to the extent that parties who seek to avoid production of documents by denying possession, have been directed to obtain and produce them when it is shown that the documents are within that party's control. *Reeves* v. *Pennsylvania R. Co.*, 80 F. Supp. 107 (D. C. Del., 1948); *The Sultana*, 77 F. Supp. 287 (D. C. W. D. N. Y., 1948); *United Mercantile Agencies* v. *Silver Fleet Motor Express, Inc.*, 1 F. R. D. 709 (D. C. W. D. Ky., 1941); *Societe Internationale Pour Par* v. *Clark*, 9 F. R. D. 263 (D. C. D. of C. 1949); *Bough* v. *Lee*, 29 F. Supp. 498 (D. C. S. D. N. Y., 1939).

Rule 34 itself specifically states that a party may be ordered to produce papers which are in his "control", as distinguished from possession. Thus, under the Rule, even though possession is lacking, a party litigant cannot defeat discovery if he has it within his power or control to obtain the documents for production.

The situation presented in the case at bar is almost identical to the situation involved in the *Reeves* and *Sultana* cases, supra. Both cases involved production of papers located in the files of the Bureau of Internal Revenue. In the *Reeves* case, a motion was made pursuant to Rule 34 for an order requiring production of plaintiff's federal income tax returns. Plaintiff answered that she did not have in her possession federal returns for the stated years or copies thereof. The regulations applicable to tax returns provide (like the Bureau's policy in the case at bar) that copies of returns may be obtained only by the person who made the return. Thus, the Court in the *Reeves* case granted the motion under Rule 34, holding that a party who has not retained copies of his returns has such control over obtaining copies, that he can be ordered to obtain same from the Bureau for production in a pending litigation. In the *Sultana* case, the motion was under Admiralty Rule 32 (which is almost identical to Rule 34 of the Federal Rules) for an order requiring libelant to obtain copies of his federal tax returns for production. The Court granted the motion and ordered libelant to obtain copies of the returns from the Bureau, and produce same for inspection in the pending action.

Equally conclusive of the full propriety of Judge Goddard's decision and order is the holding in *In re Hines*, supra. There, the question involved was whether bankrupts could be directed to obtain from the New York State Tax Commission copies of state returns filed by them, when the bankrupts denied having such returns in their possession and the applicable statute (New York Tax Law, § 384) required "secrecy" of tax officials regarding such

returns. The statute had this additional provision, however: "Nothing herein contained shall be construed to prohibit the delivery to the taxpayer * * * of a certified copy of any return or report filed in connection with his tax." Consequently, the Court of Appeals for the Second Circuit, by unanimous decision, directed the bankrupts to obtain copies of the returns from the Tax Commission and to produce same for inspection.

Judge Goddard found therefore that the documents sought by plaintiff were within petitioner's control, stating "it appears that they will be furnished to the defendant by the Commissioner if the defendant requests them" (R. 38). We submit that this holding is entirely correct under Rule 34, for any other decision would have the effect of making "possession" a prerequisite to discovery under the Rule whereas it is specifically stated therein that "control" is sufficient. Petitioner's control here is actual and positive, not a mere "fiction" as he argues in his brief. A simple request from petitioner to the Bureau will make the documents available for production.

We submit, also, that petitioner has no privilege available to prevent production of the documents. In the *Reeves, Hines* and *Sultana* cases, supra, where the regulations permitted the taxpayer to obtain copies of returns, the Courts uniformly directed the taxpayer to obtain and produce the returns. In the *Hines* case, the Court of Appeals stated, at page 53:

> "The state statute does not impose absolute secrecy upon the returns filed, nor does it make them in any way privileged. The statute plainly intends to impose secrecy upon the officials having the returns in charge * * *. But there are exceptions provided * * * when certified copies are given to the taxpayer * * *."

In *United States* v. *Monjar*, supra, defendants were indicted under fraud provisions of the Securities Act. At the trial, sworn statements made by defendants to an

Internal Revenue Agent were admitted in evidence over defendants' objection. After conviction, defendants appealed claiming, among other things, that admission of their statements to the Bureau was error because (a) this was contrary to Treasury Regulations; (b) it violated a promise to defendants, and (c) it violated the privilege provided by the Fifth Amendment. The Court of Appeals affirmed the convictions, holding that the regulations did not prohibit disclosure, and as to the matter of privilege, the statements were admissible because they had been submitted voluntarily. This Court denied certiorari.

In this connection, see also *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F. R. D. 190 (D. C. Conn., 1940); *Judson* v. *Buckley*, supra; *Welch* v. *C. G. Johnson Electrical Const. Co., Inc.*, 4 Fed. Rules Serv. 34.42 (case 1) (D. C. S. D. N. Y., 1940); *Tague* v. *Delaware L. & W. R. Co.*, 5 F. R. D. 337 (D. C. E. D. N. Y.); *June* v. *Peterson Co.*, supra.

In New York, the State Courts have uniformly held that no privilege attaches to reports and returns made to the Bureau of Internal Revenue, with the result that litigants have consistently received directions to produce same in pending actions. *Ocean Accident and Guarantee Corp.* v. *Marcus Contracting Co., Inc.*, 226 App. Div. 789 (1929); *Leonard* v. *Wargon*, 55 N. Y. S. 2d 626 (1945) (Court stated: "There is no sound public policy against such disclosure * * *; on the contrary, public policy seems to be the other way * * *"). See also *Weiner* v. *Crippen*, 245 App. Div. 364, 365, aff'd 270 N. Y. 535 (1935) (appellants contended reports submitted by them to Banking Commission, made "confidential" by statute, were inadmissible in evidence. Court overruled this contention, holding reports properly admissible).

In the case at bar, petitioner's brief alleges that the privilege asserted by him "finds its basis in the power of the Government, by regulation, or policy, to govern the custody and availability of files in its possession." This

statement, we submit, points up the delusiveness of petitioner's alleged privilege. As stated above, the Government has officially decided in this case that the documents are available for disclosure upon petitioner's request. Thus, the Government has exercised the power, which petitioner concedes it has, to establish a procedure which the courts and plaintiff in the instant action can follow to obtain disclosure of the documents sought for discovery. The Government has claimed no privilege, and has, in effect, signified its consent to disclosure of the documents.

Consequently, Judge Goddard's order is strictly in accord with this Court's decision in *Boske* v. *Comingore*, 177 U. S. 459 (1900), relied upon by petitioner. In the *Boske* case, regulations were prescribed, pursuant to 5 U. S. C. § 22, governing the disclosure of documents located in the files of Collectors of Internal Revenue. The regulations provided that such documents would be furnished in private litigations "only on rule of the court upon the Secretary of the Treasury requesting same." In spite of this prescribed procedure, the Collector in *Boske* v. *Comingore* was ordered to make an unauthorized disclosure. When he refused, he was incarcerated for contempt. This Court affirmed his release upon a writ of habeas corpus, holding that, pursuant to 5 U. S. C. § 22, department heads are authorized to reserve for their own determination the propriety of making records located in the department's files available for disclosure. Thus, *Boske* v. *Comingore* compels the conclusion that in cases where a department head determines that papers in his files are properly available for disclosure, then no one can claim that such papers are secret or privileged. If the Court orders production in accordance with the procedure established by departmental regulations or policy, then production is altogether proper and correct. Inasmuch as Judge Goddard's order is predicated upon and closely follows the procedure established by the Bureau for disclosure of the documents, his order cannot be assailed on the ground that it violates a "governmental privilege."

Petitioner makes two last efforts to enshroud his communications to the Bureau with a privilege. First, he urges that he is an "informer", and secondly he attempts to claim the veil of secrecy afforded to certain parts of a registrant's questionnaire by the Selective Service Law. Clearly, petitioner is not a Government "informer". He did not approach the Bureau to volunteer information. On the contrary, the Bureau came to him and sought to recover from petitioner the stock it claimed belonged to plaintiff. Moreover, petitioner's communications to the Bureau do not contain information about some third party. Rather, they refer only to the part petitioner played in his transactions with plaintiff, and what he did with the $46,671.21 check he received from plaintiff on May 5, 1934.

Nor is petitioner entitled to the limited privilege afforded to selectees by the Draft Law and regulations. The type of information made unavailable there concerns the selectee's dependency status, his physical and mental condition, his court record, and his previous military service (Selective Service Regulations, § 605.31). Such information is of a highly personal nature (Cf. 4 Moore Federal Practice (2d Ed., 1950), 1169-1170). Then too, the information is submitted under compulsion of law, and a failure to file, or a false statement, makes the selectee subject to severe criminal penalties.

Petitioner's communications to the Bureau are of an entirely different character than the type protected by the Selective Service Law and regulations. Petitioner's communications were made voluntarily and without compulsion. They contain no information of the intimate nature protected by the Draft regulations. Rather, they concern moneys petitioner received from plaintiff, and 1,700 shares of stock he purchased for plaintiff's account in 1934.

In conclusion, we submit that petitioner possesses no valid privilege to prevent disclosure of the documents in issue. He has pointed to no constitutional provision, statute, regulation or case which expressly or impliedly

renders his communications to the Bureau immune from production. The only privilege possible under the circumstances belongs to the Government, and the Government has expressly stated that the documents involved are available for disclosure. Since petitioner has no privilege, and since the Government is claiming none, Judge Goddard's order cannot operate to destroy a privilege or to compel disclosure of documents the Government wants to suppress. Thus, Judge Goddard properly granted plaintiff's motion for discovery, and his order directing production of the documents should be sustained upon the merits.

CONCLUSION

The petition for certiorari or mandamus should be denied.

Respectfully submitted,

EDWARD C. WALLACE,
Attorney for Nola Electric, Inc.,
60 East 42nd Street,
New York 17, N. Y.

EDWARD L. MERRIGAN,
of Counsel.